

### REMARKS

Claims 1-21 are currently pending in the subject application and are presently under consideration. Claims 1, 10, 16, and 21 have been amended herein to further emphasize aspects of applicants' claimed invention. A version of all pending claims is presented at pages 2 to 4 of this Reply. Applicants' representative thanks the Examiner for the telephonic interview on September 13, 2006, and subsequent interview summary dated September 18, 2006, where claim 1 was discussed to determine if a system that test loads a server produces a useful, concrete, and tangible result in accordance with 35 U.S.C. §101; however no agreement was reached as to this matter.

Favorable reconsideration of the subject patent application is respectfully requested in view of the comments and amendments herein.

#### **I. Rejection of Claims 1-21 Under 35 U.S.C. §101**

Claims 1-21 stand rejected under 35 U.S.C. §101 because the claimed invention is allegedly directed toward non-statutory subject matter. More specifically, the Examiner asserts that claims 1, 10, 16, and 21 provide no physical transformation, nor is any useful, concrete, or tangible result produced. It is respectfully requested that rejection of these claims be withdrawn for at least the following reason. In light of recent Federal Circuit opinion, claims 1, 10, 16, and 21 as amended do, in fact, produce a concrete, useful and tangible result such to be classified as patentable subject matter according to 35 U.S.C. §101.

Because the claimed process applies the Boolean principle [abstract idea] ***to produce a useful, concrete, tangible result*** ... on its face the claimed process comfortably falls within the scope of §101. *AT&T Corp. v. Excel Communications, Inc.*, 172 F.3d 1352, 1358. (Fed.Cir. 1999) (Emphasis added); *See State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1373, 47 USPQ2d 1596, 1601 (Fed.Cir.1998). The inquiry into patentability requires an examination of the contested claims to see if the claimed subject matter, as a whole, is a disembodied mathematical concept representing nothing more than a "law of nature" or an "abstract idea," or if the mathematical concept has been ***reduced to some practical application rendering it "useful."*** *AT&T* at 1357 *citing In re Alappat*, 33 F.3d 1526, 31 USPQ2d (BNA) 1545, 1557 (Fed. Cir. 1994) (Emphasis added) (holding that more than an abstract idea was claimed because the claimed invention as a whole was directed toward forming a specific machine that produced the useful, concrete, and tangible result of a smooth waveform display).

Independent claim 1 as amended (and similarly independent claims 16 and 21) recites, in part, *a computer-implemented system that test loads a server comprising a dynamic load adjustor component that **dynamically adjusts user characteristics** based at least in part on a browser type*. This result of dynamically adjusting user characteristics is both concrete and tangible as adjustment of such characteristics would naturally modify the state of the affected computer-implemented system. Also, the functionality of dynamically adjusting user characteristics mitigates the need for an administrator or human entity to perform such adjustment, and thus renders the claimed subject matter useful as well. In view of the foregoing, the subject matter recited in independent claims 1, 16, and 21, as well as claims 2-9 and 17-20 which respectively depend therefrom, produce a useful, concrete, and tangible result that falls within the scope of § 101 according to the Federal Circuit.

Additionally, Examiner asserts that claim 10 is rejected under 35 U.S.C. §101 for the same reasons. It is requested that this rejection be withdrawn for at least the following reason. Claim 10 recites a result that is useful, concrete, and tangible as well. The useful result recited in claim 10 is a scenario that loads a server based on user profiles to simulate server requests typical of users within an environment; the scenario is produced by an execution engine. Because the scenario comprises user profile information used to test load a server, the scenario is concrete and tangible. The fact that the scenario can **load a server via a plurality of users** is also concrete and tangible as such loading will modify the state of the server. Again, this result is also useful as the scenario and the loading thereof, help simulate a real-world usage environment for a server to determine how the server will handle a plurality of requests in the typical usage pattern. In view of the useful, concrete, and tangible result produced by claim 10 and the Federal Circuit opinion handed down in *AT&T Corp. v. Excel Communications, Inc.*, 172 F.3d 1352, 1358, rejection of this claim, as well as claims 11-15 which depend therefrom, under 35 U.S.C. §101 should be withdrawn as well.

Applicants' representative also reminds Examiner that claims 1, 10, 16, and 21, if evaluated as pertaining to software code, are still patentable in light of recent Federal Circuit opinion in *Eolas Techs., Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1338 (Fed. Cir. 2005), wherein the court stated:

Title 35, section 101, explains that an invention includes ‘any new and useful process, machine, manufacture or composition of matter.’ Without question, *software code alone* qualifies as an invention eligible for patenting under these categories, at least as processes. (emphasis added) (citations omitted).

This case further emphasizes that any new useful process, machine, *etc.*, is a patentable invention such as the claimed subject matter as shown above. The opinion also affirms that if claims 1, 10, 16, and 21 are viewed as software code, the subject matter as recited undeniably falls within the bounds of this holding. Therefore, in view of at least the foregoing, rejection of all independent claims, and associated dependent claims, under 35 U.S.C. §101, whether or not pertaining to software code, is preemptive, and thus, should be withdrawn.

### CONCLUSION

The present application is believed to be in condition for allowance in view of the above comments and amendments. A prompt action to such end is earnestly solicited.

In the event any fees are due in connection with this document, the Commissioner is authorized to charge those fees to Deposit Account No. 50-1063 [MSFTP637US].

Should the Examiner believe a telephone interview would be helpful to expedite favorable prosecution, the Examiner is invited to contact applicants’ undersigned representative at the telephone number below.

Respectfully submitted,

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